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# The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability

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# The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability

William R. Corbett†

I.	INTRODUCTION .....	24
II.	<i>IBM CORP.</i> : NARROWING THE <i>WEINGARTEN</i> RIGHT .....	28
	A. <i>The Majority: Policies—Increasing Need for Workplace Investigations and the Jeopardy Posed by Extending the Weingarten Right</i> .....	30
	B. <i>The Concurrence: Proving Section 7 Coverage and Common Law Prerogatives of Employers</i> .....	30
	C. <i>The Dissent: Making the NLRA Less Applicable to Nonunion Workers</i> .....	31
	D. <i>Critique of IBM Corp.</i> .....	32
III.	<i>HOLLING PRESS</i> : NARROWING MUTUAL AID OR PROTECTION .....	36
	A. <i>The Majority: Distinguishing Collective and Individual Objectives</i> .....	37
	B. <i>The Dissent: Civility Not Required</i> .....	38
	C. <i>Critiquing Holling Press</i> .....	39
IV.	<i>LUTHERAN HERITAGE VILLAGE-LIVONIA HOME, INC.</i> : NARROWING RESTRICTIONS ON EMPLOYER RULES .....	41
	A. <i>The Majority: Rules to Ensure a Civil, Decent, and Harassment-Free Workplace</i> .....	41
	B. <i>The Dissent: Civility Not Required by Section 7</i> .....	42
	C. <i>Critiquing Lutheran Heritage</i> .....	43
V.	POTENTIAL RAMIFICATIONS OF THE THREE DECISIONS: NARROWING SECTION 7 RIGHTS.....	45

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***“[T]he Board noted that the NLRB is not intended to be ‘a forum in which to rectify all the injustices of the workplace.’”***<sup>1</sup>

## I. INTRODUCTION

The year 2005 marks the seventieth anniversary of the passage of the Wagner Act.<sup>2</sup> Although most celebrations and festivities will await the centennial anniversary, it is an appropriate time to consider what role the National Labor Relations Act (NLRA or “the Act”)<sup>3</sup> plays in the current law of the workplace and what the future holds for the oldest labor law in the United States. Such consideration seems warranted particularly in light of recent decisions of the National Labor Relations Board (NLRB or “the Board”). One possible role for the NLRA is that it could be interpreted broadly as establishing important workplace rights and protections for both union and nonunion employees. An alternative possibility is that the Act could be interpreted narrowly as applying almost exclusively to the declining population of union workers in the United States,<sup>4</sup> and restrictively even as to them. Either role is possible, and which of the two prevails depends largely upon how the National Labor Relations Board interprets section 7 of the NLRA.<sup>5</sup> Section 7 sets out the basic rights under the Act. It reads, in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .<sup>6</sup>

Just three years ago, I wrote an article in which I argued that the NLRA, based on the National Labor Relations Board’s interpretations,

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1. *Holling Press, Inc.*, 343 N.L.R.B. No. 45, 2004 WL 2368662, at \*3 n.15 (Oct. 15, 2004) (quoting *Meyers Indus.*, 281 N.L.R.B. 882, 888 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988)).

2. Pub. L. No. 74-198, 49 Stat. 499 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2004)).

3. The current National Labor Relations Act is the Wagner Act, as amended by ch. 120 of the Taft-Hartley amendments of 1947, 61 Stat. 136 (1947), and the Landrum-Griffin amendments of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959).

4. The percentage of employees in the United States represented by unions has declined from a peak in the early 1950s of approximately 36% of the workforce. See *Right-to-Work Advocates Mark Labor Day with Calls for Repeal of National Labor Law*, Daily Lab. Rep. (BNA) No. 170, at A-11 (Sept. 2, 2005). The current level is about 12.5% of the workforce and 7.9% of the private workforce. *Union Membership Rate Dropped in 2004 to 12.5 Percent, Continuing 20-Year Decline*, Daily Lab. Rep. (BNA) No. 18, at AA-1 (Jan. 28, 2005). In 1983, the first year for which the Bureau of Labor Statistics has comparable data, the level of union membership was 20.1%. *Id.*

5. 29 U.S.C. § 157 (2006).

6. *Id.*

could be an important source of rights and protections for nonunion workers.<sup>7</sup> I asserted that an expansive interpretation of the Act was needed and desirable because the NLRA's section 7 rights, when applied to nonunion workers, provide important general protections not available under other laws. Although some of the section 7 rights are linked to unions and collective bargaining, employees who are neither members of a union nor seeking to be represented by a union can engage in conduct protected by section 7 when their conduct is 1) concerted and 2) for the purpose of mutual aid or protection.<sup>8</sup> Whereas other individual employment laws<sup>9</sup> protect certain specific rights, the NLRA protects the general right of employees to engage in unspecified concerted activity for mutual aid or protection.<sup>10</sup> I argued in my previous article that this general section 7 right could do more to protect workers than the effort to pass new state or federal legislation not only because it is increasingly difficult to enact such legislation in a globally competitive world but also because participating in concerted activity empowers employees to speak up to their employers and to engage with them on key aspects of the employment relationship.

At the time I wrote that article, the NLRB's decisions interpreting section 7 seemed to permit coverage of a broad range of employee conduct regardless of whether employees were represented by a union. However, in the short period since my original article, several NLRB decisions have shifted the law under the NLRA toward a more restrictive, pro-employer interpretation of section 7.<sup>11</sup> Three recent Board decisions, considered

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7. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002).

8. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 1102-1104 (1962); *Abramson, LLC*, 345 N.L.R.B. No. 8, 2005 WL 2094298, at \*3 (Aug. 26, 2005). Although those two requirements may be more easily satisfied when employees are represented by a union, they also may be satisfied when no union represents employees. See, e.g., *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248 (1997). The statutory phrase "for . . . mutual aid or protection" has generally been interpreted to mean that there must be a connection between the conduct and the interests of the employees as employees. See *Eastex v. N.L.R.B.*, 437 U.S. 556 (1978). Thus, whether the requirement is satisfied is usually determined by how closely the conduct is connected with working conditions. See generally ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING*, §16.3 (1976). Even when conduct satisfies the dual requirements of "concerted" and "for mutual aid or protection," that conduct may lose its protected status if it is too violent, disruptive, or disloyal to the employer. *Id.*; see also *NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464, 471-72 (1953) (finding employees conduct to be "detrimentally disloyal"); Calvin William Sharpe, "By Any Means Necessary"—*Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203, 209-10 (1999).

9. This category includes all federal employment laws other than the NLRA.

10. See, e.g., Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992) (discussing the individual rights approach to workplace law compared with the collective approach); Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687 (1997).

11. This trend has not gone unnoticed. See, e.g., Paul Galligan, *New Directions for the NLRB: Further erosion of Clinton-era rulings is probable*, N.Y.L.J., Apr. 4, 2005, at 9; *NLRB Continues to*

together, cause me to reach this conclusion: *IBM Corp.*,<sup>12</sup> *Holling Press, Inc.*,<sup>13</sup> and *Lutheran Heritage Village-Livonia Home, Inc.* (“*Lutheran Heritage*”).<sup>14</sup> Each of these decisions changes an aspect of the law that I discussed in my earlier article.

While only *IBM Corp.* clearly overrules Board precedent, holding that the *Weingarten* right does not apply to nonunion employees, *Holling Press* and *Lutheran Heritage* also represent important changes in the law. *Lutheran Heritage* alters the Board’s analysis of whether it is an unfair labor practice for employers to maintain rules prohibiting aggressive or hostile speech by employees. *Holling Press*, potentially the most limiting of the three decisions, narrowly interprets the statutory requirement that conduct be “for the purpose of . . . mutual aid or protection”<sup>15</sup> in order to gain protection under section 7. Although *Holling Press* and *Lutheran Heritage* involved unionized employees, the principles they articulate are likely to have a more pronounced effect in removing section 7 protection from nonunion employees. Union workers can more easily satisfy the section 7 requirements of “concertedness” and “for mutual aid or protection” than nonunion employees, and, even if such requirements are not satisfied, union employees may still be covered by the other section 7 rights relating to collective bargaining.

A common theme in the three decisions is that each discusses, to differing degrees, the employer’s right and obligation, on pain of potential legal liability, to maintain a harassment-free, civil, and safe workplace. To enable employers to achieve this obviously important objective, the decisions narrowly interpret employee rights under section 7. In *IBM Corp.* and *Lutheran Heritage*, the Board limited employees’ ability to claim protection under section 7 in part out of its concern that employers should be able to conduct investigations and maintain rules that help them avoid liability for harassment. Ironically, the Board in *Holling Press* held that section 7 did not protect an employee pursuing a state law sexual harassment claim when she aggressively sought the assistance of a co-employee as a witness. I find it troubling that the agency charged with interpreting and enforcing the NLRA would read it so narrowly in order to avoid potential conflict with other laws (principally employment discrimination laws)<sup>16</sup> and in order to create a kinder, gentler workplace.

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*Make Changes*, Lab. L. Rep. Insight (CCH), No. 890, Issue 1405 (Feb. 23, 2005); Ross Runkel, *NLRB Reversals During the Bush Administration*, Employment Law Memo, <http://www.lawmemo.com/articles/nlrbreversals.htm>, (last visited on Oct. 18, 2005).

12. 341 N.L.R.B. No. 148, 2004 WL 1335742 (June 9, 2004).

13. 343 N.L.R.B. No. 45, 2004 WL 2368662 (Oct. 15, 2004).

14. 343 N.L.R.B. No. 75, 2004 WL 2678632 (Nov. 19, 2004).

15. 29 U.S.C. § 157 (2006).

16. See Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 605-08 (2005).

*IBM Corp.*, *Holling Press*, and *Lutheran Heritage* have sparked debate about the proper role of the NLRA in the workplace and the role of the Board in interpreting the Act. Some commentators argue that the NLRB's recent cases substantially narrow the coverage and protections of the Act,<sup>17</sup> while others argue that the reversals do not signify anything significant.<sup>18</sup> Indeed, Board members themselves disagree about the potential ramifications of their actions and whether their decisions aggressively overrule precedent.<sup>19</sup>

It is, admittedly, a precarious endeavor to make broad assertions about the movement of an area of the law based on decisions rendered over a short period of time, especially because the law of the Board changes frequently, depending in significant part on its political composition.<sup>20</sup> Nevertheless, I undertake such a task in this article out of a sense of obligation. The recent trends, decisions, and appointments at the NLRB<sup>21</sup> indicate that the NLRA's future as a source of rights and protections for nonunion workers will be insignificant at best. Moreover, the Board's

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17. *Union, Management Attorneys Disagree On Significance of Recent NLRB Rulings*, Daily L. Rep. (BNA) No. 103, at C-1 (May 31, 2005) (reporting the comments of AFL-CIO General Counsel Jon Hiatt); Galligan, *supra* note 11, at 9 (reviewing decisions reversing or narrowing interpretations by the Clinton Board and making predictions regarding possible future reversals); Susan J. McGolrick, *AFL-CIO Counsel, Management Attorney Both Fault New Direction of Labor Board*, Daily Lab. Rep. (BNA) No. 19, at A-7 (Jan. 31, 2005) (reporting comments of Jon Hiatt and Professor Samuel Estreicher).

18. Kenneth R. Dolin, *Bush-Era NLRB Rulings*, NAT'L L.J., June 13, 2005, at 13 (arguing that recent Board decisions can be characterized as applying established principles and standards); *Union, Management Attorneys Disagree On Significance of Recent NLRB Rulings*, *supra* note 17; see also Robert J. Battista, Chairman, National Labor Relations Board, Remarks at 58th NYU Annual Conference on Labor (May 20, 2005), reprinted in *NLRB Chairman Battista's Speech at New York University's Labor Conference*, Daily Lab. Rep. (BNA) No. 98, at E-1 (May 23, 2005).

19. See John Herzfeld, *Members Schaumber, Liebman Discuss Differing Views on Recent Board Decisions*, Daily Lab. Rep. (BNA) No. 10 (March 10, 2005) (discussing comments of two Board members at an American Bar Association Conference).

20. See *infra* notes 53-55 and accompanying text. The Board consists of five members appointed by the President with advice and consent of the Senate for staggered five-year terms. 29 U.S.C. § 153(a) (2006). By custom and practice, three members are of the same political party as the President, and two are of the other party. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1372 n.41 (2000).

21. The Board now is at full strength with five members. On August 31, 2005, the President appointed Member Peter Schaumber to a recess appointment on the Board. Susan J. McGolrick, *Schaumber Gets NLRB Recess Appointment; White House Nominates New USCIS Director*, Daily Lab. Rep. (BNA) No. 169 (Sept. 1, 2005). Member Schaumber, a Republican, will serve until the Senate adjourns its 2006 session. On January 4, 2006, the President appointed Peter N. Kirsanow, a Republican, to a recess appointment. *Kirsanow Appointment Pleases Business, But Democrats, AFL-CIO Criticize Action*, Daily Lab. Rep. (BNA) No. 4, at AA-1 (Jan. 6, 2006). On January 17, 2006, President Bush filled the last Board vacancy with the recess appointment of Dennis Walsh, a Democrat, a term that ends when the Senate adjourns in 2007. See *Walsh Named in Recess Appointment to Fill Board's Remaining Vacancy*, Daily Lab. Rep. (BNA) No. 11, at A-12 (Jan. 18, 2006). In most of the Board decisions discussed in this article, Member Schaumber joined Chairman Battista and Member Meisburg in the majority while Members Liebman and Walsh dissented (Members Meisburg and Walsh were not on the panel in *Holling Press*).

restrictive interpretation of section 7 will gradually diminish the rights and protections for unionized employees as well.

Because of the Board's actions and the changing nature of the law, my earlier recommendations and predictions are now questionable. Thus, this article hopes to call attention to what I think is an alarming trend in the Board's decisions. Although the law under the NLRA may change again as the composition of the Board changes, I am concerned that a vision of the NLRA as part of the overall law of the workplace in the United States may fade and be replaced by a view that the Act is just the labor law that applies to unionized workers.

The following sections discuss the *IBM Corp.*, *Holling Press*, and *Lutheran Heritage* decisions and consider their possible ramifications. I conclude that the decisions narrow the NLRA in significant ways for both union and nonunion employees. Unfortunately, the Board's narrow construction of the NLRA minimizes the Act's role in the overall labor and employment law regime of this nation. Just three years ago, I thought it had greater potential.

## II.

### *IBM CORP.*: NARROWING THE *WEINGARTEN* RIGHT

The Supreme Court held in *NLRB v. Weingarten, Inc.* that an employer commits an unfair labor practice when it denies an employee's request to have a union representative present at an investigatory interview that the employee reasonably believes may result in discipline.<sup>22</sup> According to the Court, this right emanates from section 7 of the NLRA's protection of activity that is concerted and for mutual aid or protection. The *Weingarten* Court left it to the Board to address a question that has spawned five decisions and four changes of law over a twenty-two year period: whether employees who are not represented by a union have a similar right to be accompanied by a co-employee at an investigatory interview that might result in discipline.

In the first decision to address this question, *Materials Research Corp.*, the Board held that the *Weingarten* right does extend to nonunion employees.<sup>23</sup> Three years later in *Sears, Roebuck & Co.*, the Board reversed its position, holding that the *Weingarten* right is not rooted in section 7 and does not extend to nonunion employees.<sup>24</sup> Three years after *Sears*, the Board modified its position again in *E.I. DuPont De Nemours*.<sup>25</sup> There, the Board held that non-application of the *Weingarten* right to nonunion

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22. 420 U.S. 251 (1975).

23. 262 N.L.R.B. 1010 (1982).

24. 274 N.L.R.B. 230 (1985).

25. 289 N.L.R.B. 627 (1988).

employees is a permissible but not a mandatory interpretation of the NLRA, and it chose to adhere to nonextension of the right.<sup>26</sup> Subsequently, in *Epilepsy Foundation of Northeast Ohio*<sup>27</sup> the Board overturned *Sears and DuPont* and restored its holding in *Materials Research: the Weingarten* right emanates from section 7 and is “equally applicable” regardless of whether the employee requesting accompaniment in the interview is represented by a union. The Board explained that extending the *Weingarten* right to nonunion employees “effectuates the policy that ‘Section 7 rights are enjoyed by all employees and are in no wise [sic] dependent on union representation for their implementation.’”<sup>28</sup>

Most recently, in *IBM Corp.*, the Board changed its position on this issue for a fourth time.<sup>29</sup> It overruled *Epilepsy Foundation* and returned to its *DuPont* holding. Either interpretation of the NLRA is permissible, stated the Board, but it chose, on policy grounds, not to extend the *Weingarten* right to unrepresented employees. In *IBM Corp.* the employer interviewed several employees in connection with an investigation about a charge of harassment made by a former contract employee. After the employer conducted a few interviews, some employees determined that they had a right to have a co-employee present as a witness in future interviews. These employees discovered they had this right through different means. For example, a suspended manager (and former military officer) advised one interviewee that, based on his military experience, the employee should ask for a witness at such interviews. Another employee said he “searched the web” and determined that he had a right to have a representative present.<sup>30</sup>

The employer denied the workers’ requests to have a co-employee present. In fact, the supervisor conducting the interviews denied that the employees even requested accompaniment at the interviews.<sup>31</sup> However, the employees filed a unfair labor practice charge and the administrative law judge who initially heard the case found that they made such requests and that their requests were denied.<sup>32</sup> Relying on *Epilepsy Foundation*, the ALJ found that the employer violated section 8(a)(1) of the Act,<sup>33</sup> which

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26. *Id.* at 630-31.

27. 331 N.L.R.B. 676 (2000), *aff’d in relevant part*, 268 F.3d 1905 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

28. *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. at 678 (quoting *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309, 1311 (1978)).

29. 341 N.L.R.B. No. 148, 2004 WL 1335742, at \*10-12 (June 9, 2004).

30. *Id.* at \*37-40.

31. *Id.* at \*40.

32. *Id.* at \*1.

33. “It shall be an unfair labor practice for an employer to – (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” 29 U.S.C. § 158(a)(1) (2006).



makes it an unfair labor practice to interfere with the exercise of rights guaranteed by section 7.

*A. The Majority: Policies—Increasing Need for Workplace Investigations and the Jeopardy Posed by Extending the Weingarten Right*

The Board majority overruled the ALJ and reversed course from *Epilepsy Foundation*. Returning to its holding in *DuPont*, the Board first stated the Act can be interpreted to either extend or deny the *Weingarten* right to employees not represented by a union.<sup>34</sup> The Board then chose to withhold the *Weingarten* right from non-union workers, thereby reversing *Epilepsy Foundation*. The Board reasoned that the “ever-increasing requirements to conduct workplace investigations”<sup>35</sup> brought about by changes in the laws prohibiting workplace discrimination and sexual harassment, the rise in incidents of workplace violence, and the events of September 11, 2001, made extending the right imprudent.<sup>36</sup> In light of the increasing need to conduct investigations, the Board found that the policy concerns expressed in *DuPont* all counseled against giving nonunion employees the right to have co-workers present at investigatory interviews. Specifically, the Board focused on the fact that co-workers, unlike union representatives, do not represent the interests of the entire workforce, do not level the power imbalance between employer and employee, do not have the skills of union representatives, and increase the chances that confidential information will be compromised.<sup>37</sup>

*B. The Concurrence: Proving Section 7 Coverage and Common Law Prerogatives of Employers*

In his concurrence, Member Schaumber agreed with the majority on the policy rationale for overturning *Epilepsy Foundation*, but he gave additional reasons for denying the *Weingarten* right to nonunion employees. He argued that *Epilepsy Foundation* was wrongly decided because it presumed the concerted nature of the conduct rather than requiring additional proof of concertedness.<sup>38</sup> Member Schaumber claimed that in *Epilepsy Foundation*, the Board erroneously presumed that nonunion employees satisfied the section 7 requirements of concertedness and action “for mutual aid or protection” whenever they requested accompaniment merely because *Weingarten* held that similar requests made by union employees satisfied both provisions of section 7. Although Member

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34. IBM Corp., 341 N.L.R.B. No. 148, 2004 WL 1335742, at \*2 (June 9, 2004).

35. *Id.* at \*3.

36. *Id.* at \*6.

37. *Id.* at \*6-8.

38. *Id.* at \*19 (Schaumber, Member, concurring).

Schaumber mentioned the two requirements, he focused his criticism of *Epilepsy Foundation* on its presumption of concertedness when a nonunion employee requests the presence of a co-worker at an interview. He claimed that the Board in *Epilepsy Foundation* had relied on a discredited analysis of concertedness from the *Alleluia Cushion*<sup>39</sup> decision rather than on the correct analysis outlined in the controlling Board precedent of *Meyers II*.<sup>40</sup> The requirements of concertedness and for mutual aid or protection are separate and distinct requirements, emphasized Member Schaumber, and he argued that each must be proved using the appropriate analysis.<sup>41</sup>

Thus, Member Schaumber claimed that asking a co-worker to attend an investigatory interview was not necessarily concerted activity protected by section 7. Additionally, he contended that in the absence of a collective bargaining agreement, management has a “common law right” to deal with employees on an individual basis and that extending *Weingarten* to nonunion employees violates this right.<sup>42</sup> By requiring separate proof for the concertedness and mutual aid prongs of section 7 and then by narrowly defining what qualifies as concerted, Member Schaumber leaves little room for the NLRA to function outside of a union setting. As I will discuss below, the Board majority in *Holling Press*, would further limit the reach of the Act by narrowly interpreting what qualifies as “for mutual aid or protection.”<sup>43</sup>

### C. *The Dissent: Making the NLRA Less Applicable to Nonunion Workers*

The dissent by Members Liebman and Walsh recognized that overturning *Epilepsy Foundation* would make the NLRA less relevant in the contemporary workplace and deny nonunion employees a right that might have some value to them. Initially observing that “[t]he decision to overrule a recent precedent, carefully reasoned and upheld in the courts, should be based on far more compelling reasons than our colleagues have articulated,”<sup>44</sup> the dissent questioned whether the majority had made a convincing case that extending the *Weingarten* right to nonunion workers would significantly interfere with the increasing number of investigations required or encouraged by other laws. Even assuming such a case were established, the dissent questioned why, in balancing the section 7 rights of

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39. 221 N.L.R.B. 999 (1975).

40. 281 N.L.R.B. 882 (1986), *enforced sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

41. IBM Corp., 341 N.L.R.B. No. 148, 2004 WL 1335742, at \*22 (June 9, 2004) (Schaumber, Member, concurring).

42. *Id.* at \*17.

43. See *infra* notes 64-80 and accompanying text.

44. IBM Corp., 2004 WL 1335742, at \*32 (Liebman and Walsh, Members, dissenting).

the NLRA against employers' concerns under other laws, the NLRA categorically must lose.<sup>45</sup> The dissent also challenged Member Schaumber's analysis of the concertedness requirement, arguing that he incorrectly interpreted *Epilepsy Foundation* and *Materials Research* as being based on a rejected view of concerted activity and that he erred in his analysis of how *Meyers II* applies to a nonunion employee requesting accompaniment.<sup>46</sup>

#### D. Critique of IBM Corp.

The *IBM Corp.* dissent establishes the starting point for critiquing the majority's opinion, namely whether the policy concerns cited by the majority have, as the Board stated, taken on new vitality. The majority wrote of changes in the workplace in recent years,<sup>47</sup> a period it left undefined, and stated that the need for investigatory interviews had increased since *Weingarten*. However, workplace changes since *Weingarten* do not seem to be relevant. Not only did the Board not suggest that such changes made the right of union employees less compelling, but the Board failed to explain what workplace conditions had changed since *Epilepsy Foundation*, the Board's most recent case on the issue. Regardless of the time period to which the Board referred or should have referred, the rationale of changed conditions and increased need for workplace investigations rings hollow. Laws prohibiting sex discrimination and harassment in the workplace, such as Title VII of the Civil Rights Act of 1964,<sup>48</sup> existed long before the Board in *Materials Research Corp.* first extended the *Weingarten* right in the nonunion context. If the need to conduct investigations into allegations of harassment counseled against extension of the *Weingarten* right then why did the Board in *Materials Research* even reach the decision that it did?

Perhaps the *IBM Corp.* majority meant that court decisions on sexual harassment since *DuPont* or *Epilepsy Foundation* emphasized the need for prompt and effective investigations of sexual harassment,<sup>49</sup> but it did not say that. In fact, court cases have long established that employers need to investigate and promptly and effectively address complaints alleging sexual

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45. *Id.* at \*33.

46. *Id.* at \*32.

47. IBM Corp., 341 N.L.R.B. No. 148, 2004 WL 1335742, at \*6 (June 9, 2004).

48. Pub. L. No. 88-352, 78 Stat. 66 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000e-15) (2004).

49. The most obvious example would be the analytical framework for harassment perpetrated by supervisors announced by the Supreme Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) (holding employers strictly liable for sexual harassment perpetrated by supervisors that results in a tangible employment action, but providing employers with an affirmative defense to harassment that does not result in a tangible employment action), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (same).

harassment. Thus, it is difficult to understand the Board's concern about changes in the law increasing the need for prompt investigations of sexual harassment. The Board's concern with workplace violence also rings hollow. Perhaps the number of incidents of workplace violence has increased in recent years, but the Board did not substantiate that assertion. Furthermore, it is not clear that more investigations are being performed based on any such increase.

The invocation of 9/11 is the most unusual reason given by the Board for the increase in workplace investigations. It seems that the reference to 9/11 is simply a mantra: mention the tragedy of 9/11 and everyone accepts that the world has changed and that any modifications made in reaction to that changed world are justified.<sup>50</sup> Certainly, the Board's use of 9/11 as a basis for limiting the *Weingarten* right is not the only time that tragedies and national security have been used to justify a limitation of legal rights,<sup>51</sup> but it may be the most inscrutable.

While the Board attempted to justify its reversal of *Epilepsy Foundation* based on changed workplace conditions,<sup>52</sup> it might instead have grounded its decision on a more straightforward rationale: this is simply an issue on which the Board has vacillated over the years, and the current Board believes that *DuPont* is the better result.<sup>53</sup> Certainly, the Board has "changed its mind" several times regarding the extension of the *Weingarten* right to nonunion employees, and courts may defer to the Board notwithstanding the vacillations.<sup>54</sup> Indeed, when the D.C. Circuit reviewed *Epilepsy Foundation* the petitioners argued that the Board had not adequately explained the decision and had diverged from its *DuPont* holding. The court did not think the level of deference should be diminished by the shifting positions of the Board:

An otherwise reasonable interpretation of § 7 is not made legally infirm because the Board gives *renewed*, rather than new, meaning to a disputed

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50. The dissent ridiculed that reason: "[W]e would hope that the American workplace has not yet become a new front in the war on terrorism and that the Board would not be leading the charge, unbidden by other authorities." *IBM Corp.*, 2004 WL 1335742, at \* 28 (Liebman and Walsh, Members, dissenting).

51. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945) (upholding conviction of American citizen of Japanese ancestry for violating order excluding persons of Japanese ancestry from West Coast military area). Recent debate about limitation of civil liberties based on national security concerns has focused on the Patriot Act. See, e.g., James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403 (2006).

52. *Nonunion Workers Lose Weingarten Right*, Lab. L. Rep. Insight (CCH), No. 867, at 2 (July 28, 2004) (quoting Professor Joan Flynn).

53. *Id.*

54. In *NLRB v. Curtin Matheson Scientific, Inc.*, the Supreme Court commented on deference to the Board even when the Board changes positions: "[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy." 494 U.S. 775, 787 (1990) (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975)).

statutory provision. It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference.

. . . .  
. . . The Board's conclusion obviously is debatable (because the Board has "changed its mind" several times in addressing this issue); but the rationale underlying the decision in this case is both clear and reasonable. That is all that is necessary to garner deference from the court. . . . The [petitioner's] challenge here is merely an attack on the wisdom of the agency's policy, and, therefore, the challenge must fail.<sup>55</sup>

Based on the Board's history with the *Weingarten* right in nonunion settings, one reaction to *IBM Corp.* is to say simply that the Board has changed its mind again and that this is neither surprising nor a big deal. Another reaction to the *IBM Corp.* opinion is that the majority did less to narrow section 7 rights than the approach advanced by the concurrence would have because the majority agreed that both interpretations of section 7 are permissible and only overturned *Epilepsy Foundation* on policy grounds.

However, despite purportedly limiting the nature of its holding and despite the history of the Board's position on this issue, two aspects of the majority opinion cause concern regarding the narrowing of section 7. First, the majority had no qualms about overturning a recent Board decision even when it represented a permissible interpretation of the Act.<sup>56</sup> Second, the majority opted for a narrower interpretation of section 7 when an interpretation of the NLRA raised the specter of employer liability under other laws. Why did the Board let potential employer liability under other laws influence it to adopt a narrower interpretation of section 7 of the NLRA? Employers may face conflicting obligations under the various labor and employment laws, and it is appropriate for the Board to take these considerations into account in interpreting section 7. These overlapping and conflicting obligations do pose problems and challenges for employers.<sup>57</sup> Still, there is cause for concern when the Board reaches a

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55. *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1097 & 1102 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

56. The Supreme Court has indicated that the Board's rulings are entitled to deference even when the Board changes positions. *See supra* text accompanying notes 54-55. Still, some courts have shown impatience with the Board's vacillations. *See, e.g.*, *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 209-12 (5th Cir. 2001); *Hammontree v. NLRB*, 925 F.2d 1486, 1514 (D.C. Cir. 1991) (Mikva, J., dissenting) ("[A] reviewing court should accord the Board's vacillating interpretations of the Act no particular deference."). One could speculate that the Board may, at some point, risk the deference that it should receive from courts when interpreting the Act, but that is speculation.

57. *See, e.g.*, Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 18-19 (1988) ("One can scarcely imagine an arrangement better designed to hold out

decision like *IBM Corp.* and narrowly interprets the law it is charged with enforcing. *IBM Corp.* begs the question of whether the Board accurately assessed potential employer liability under Title VII and other laws.<sup>58</sup> On this point, the dissent correctly pointed out that the majority did not adequately explain the peril to sexual harassment investigations posed by extension of the *Weingarten* right.<sup>59</sup> Further, even if the Board's interpretation of the potential liability of employers under other laws was accurate, one could also ask whether the Board should resolve the conflict by narrowly interpreting the NLRA. In my view, the Board should not restrictively interpret the NLRA just to avoid potential problems for employers under other laws. The Board should enforce the NLRA and not spend as much time theorizing about potential conflicts with laws outside of its jurisdiction. If a conflict develops between the NLRA and other laws in ways that either pose difficulties for employers or jeopardize important federal policy, the courts or Congress can act as a check and make adjustments.<sup>60</sup>

Further, the concurrence causes additional concern about limiting section 7 rights for union and nonunion workers. At first glance, the concurrence's insistence that proof of the concerted nature of the conduct should be required rather than presumed does not necessarily seem unreasonable. However, when the concurrence's narrow interpretation of what qualifies as concerted is considered with the Board's decision in *Holling Press* which, as discussed below, narrowly interprets what qualifies as "for mutual aid or protection" you suddenly have an NLRA that applies to a very small range of activity. Further, the concurring opinion's insistence on the common law prerogatives of the employer in the absence

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promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery."); Hodges, *supra* note 16, at 608.

58. See Hodges, *supra* note 16, at 605-06 (questioning whether agency considering another law will accurately interpret that law and even if so, whether it will have a "nuanced understanding of the legal implications of its interpretation").

59. *IBM Corp.*, 341 N.L.R.B. No. 148, 2004 WL 1335742, at \* 28 (June 9, 2004) (Liebman and Walsh, dissenting).

60. The Federal Courts of Appeals and the Supreme Court can review decisions of the Board and determine whether the Board is properly resolving conflicts between the NLRA and other employment laws. 29 U.S.C. § 160 (e) & (f) (2006). For example, the Supreme Court has considered cases in which the breadth of the Board's discretion to fashion remedies for violations of the NLRA was at issue because of possible conflict with other laws. The Supreme Court considered a case in which it decided that the Board had overstepped its jurisdiction in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 533 U.S. 137 (2002). In that case, the Board ordered a backpay award to an undocumented alien worker who was discharged by his employer for supporting a union. The Court held that the Board's generally broad discretion to order remedies for violations of the NLRA is limited by federal immigration policy evidenced in the Immigration Reform and Control Act of 1986. In contrast, the Supreme Court upheld the Board's award of backpay to an employee who committed perjury at a compliance proceeding in *ABF Freight, System, Inc. v. NLRB*, 510 U.S. 317 (1994).

of a collective bargaining agreement suggests that Member Schaumber sees little role for the NLRA in the nonunion workplace.

In extending the *Weingarten* right to nonunion employees, *Epilepsy Foundation*, like *Materials Research*, provided a significant statement regarding the broad applicability of section 7 rights to nonunion employees. The Board's reversal of *Epilepsy Foundation* in *IBM Corp.*, although perhaps not that important practically—most nonunion employees probably never knew they possessed the *Weingarten* right and employers did not have an obligation to advise them of the right<sup>61</sup>—serves as a symbolically meaningful restriction of section 7 rights that leaves out nonunion employees.<sup>62</sup> This restriction makes the NLRA less relevant as a broad source for worker protection.

### III.

#### *HOLLING PRESS*: NARROWING MUTUAL AID OR PROTECTION

In *Holling Press*, a 2-1 panel decision, an employee complained to her union steward that a supervisor had sexually harassed her. The union and employer investigated, and both determined that the complaint was meritless. The complainant then contacted the state fair employment practice agency. When another employee at the company mentioned that a supervisor had made a sexually charged statement to her, the complainant asked the coworker and another employee to testify before the state agency. She added that if they refused to testify they could be subpoenaed. On learning of the employee's request that coworkers testify on her behalf, the company first suspended her for threatening them and then terminated her for trying "to coerce coworkers into collaborating an unsubstantiated charge of sexual harassment."<sup>63</sup> The employee then filed an unfair labor practice charge. The ALJ assigned to the case concluded that the employee's conduct was not concerted within the meaning of section 7 because it was not undertaken for mutual aid or protection and therefore dismissed the charge. The Board then took the case on review.

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61. See, e.g., Carlton J. Snow, *Collective Agreements and Individual Contracts in Labor Law*, 50 AM. J. COMP. L. 319, 341 (2002) ("It is reasonable to conjecture that the vast majority of non-union workers in the United States have no knowledge of their *Weingarten* rights."); *Nonunion Workers Lose Weingarten Right*, supra note 52 (quoting Professors Charles Craver and Joan Flynn).

62. In a case decided in 2005, the Board held that nonunion employees engaged in 12-hour peaceful work stoppage in their employer's parking lot were not protected by the NLRA because the employees section 7 rights were outweighed by the employer's property interest. *Quietflex Manuf. Co.*, 344 N.L.R.B. No. 130, 2005 WL 1564870 (June 30, 2005). Dissenting, Member Liebman cited *IBM Corp.* for the proposition that there is "a continuing erosion of the Section 7 rights of unorganized workers." *Id.* at \*11 & n.5 (Liebman, member, dissenting).

63. *Holling Press*, 343 N.L.R.B. No. 45, 2004 WL 2368662, at \*1 (Oct. 15, 2004).

A. *The Majority: Distinguishing Collective and Individual Objectives*

The majority initially disagreed with the ALJ and found that the conduct at issue was concerted because the employee appealed to another for help.<sup>64</sup> However, the majority upheld the dismissal of the charge. The majority stressed that the two requirements for section 7 protection—“concerted” and “for mutual aid or protection”—were separate and distinct inquiries and that each must be satisfied.<sup>65</sup> The majority saw the complaining employee’s aggressive language toward her co-workers and the other employees’ lack of interest in helping with the case as indicative that no mutual purpose existed. Instead, the Board found that the complainant had pursued the claim only to benefit herself.<sup>66</sup> The majority rejected the argument that her conduct was for mutual aid or protection because it might spare other employees from future sexual harassment. The Board stated, “The bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection.”<sup>67</sup>

The majority’s decision to deny section 7 protection to the employee in *Holling Press* raised a potential conflict with Board precedent. As just discussed, the Board in *IBM Corp.* had reiterated the validity of the *Weingarten* rule, namely that, at least in a union setting, an employee’s request for co-employee accompaniment at an investigatory interview was protected conduct under section 7. The *Holling Press* majority needed to show why a request to have a co-worker employee at an investigatory interview was for mutual aid or protection, but a request to have an employee to testify in a hearing by a state agency investigating sexual harassment was not.

The majority distinguished these scenarios on two grounds. First, the majority argued that a request to have a coworker present at a workplace investigation that may lead to discipline is substantially different than asking to have a co-worker testify at a hearing on your behalf. The former satisfies the mutual aid prong of section 7 because discipline is an issue that affects all employees, and it is likely that any coworker being asked to provide accompaniment may herself be subjected to such an investigation in the future. By contrast, the majority claimed that sexual harassment claims are more uncommon and it is unlikely that the coworker will herself

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64. *Id.* at \*2.

65. *Id.* at \*1, \*3.

66. *Id.* at \*3.

67. *Id.* at \*4.



be subjected to sexual harassment in the future.<sup>68</sup> Thus, the majority claimed that there was not the same level of mutual interest or need for mutual aid when an employee asks another worker to testify at a hearing. Second, the majority stated that requests for accompaniment are more likely to be for mutual benefit when made in the context of internal investigations for the simple reason that internal workplace investigations are more common than external suits or charges.<sup>69</sup>

Perhaps recognizing that the decision may deprive all employees pursuing sexual harassment claims of section 7 protection, the majority stated in a footnote that the complaining employee who solicited coworker testimony might be protected by other laws.<sup>70</sup> The majority seemed to be saying its restrictive interpretation of section 7 was not a problem in the context of sexual harassment because other laws provide adequate protection for employees seeking assistance from their co-workers. As in *IBM Corp.* the majority thus chose to see the NLRA as applying only in a narrow range of circumstances.

#### B. *The Dissent: Civility Not Required*

The dissent argued that the majority's interpretation of the "mutual aid or protection" prong of section 7 departed from the established rule that conduct or complaints need only involve terms or conditions of employment to be protected.<sup>71</sup> The fact that only one employee may have raised a claim of sexual harassment was relevant to establishing concertedness, but not to mutual aid or protection.<sup>72</sup> Since the majority found that the employee satisfied the concertedness prong, the dissent took issue with the majority's claim that sexual harassment allegations were not about the general terms and conditions of employment. The dissent labeled as "absurd" the proposition that sexual harassment and other forms of illegal discrimination are too rare to be a matter of mutual interest among employees.<sup>73</sup> While acknowledging that the conduct of the complaining employee was not laudable, the dissent stated that "Section 7 requires neither altruism, nor unequivocal solidarity, on the part of an individual employee who seeks help from coworkers with respect to working conditions."<sup>74</sup> Rather, since the employee's requests to her co-workers were about an issue that clearly involved the terms and conditions of

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68. *Id.* at \*5.

69. *Id.*

70. *Id.* at \*4 n.17.

71. *Id.* at \*7 (Liebman, Member, dissenting).

72. *Id.* at \*6.

73. *Id.* at \*7.

74. *Id.* at \*8.

employment, the requests were for mutual aid or protection, and, thus, her conduct was protected by section 7.

### C. Critiquing *Holling Press*

The majority's suggestion that mutuality depends on the frequency of the type of conduct and any attendant investigation and its supposition that sexual harassment and related investigations are rare and isolated is difficult to understand. This is particularly true because *IBM Corp.* used the employer's need to conduct investigations into allegations of harassment as a basis to overturn existing precedent and deny the *Weingarten* right to nonunion employees. The *Holling Press* majority struggled to distinguish *IBM Corp.* on the ground that sexual harassment allegations lacked a mutual interest for all employees. Yet, the decisions provide an interesting juxtaposition: in *IBM Corp.*, the Board found that an employers' need to conduct sexual harassment investigations was a sufficient reason to deny the *Weingarten* right to nonunion employees and to restrictively interpret section 7; while in *Holling Press* the Board claimed that the infrequency of sexual harassment and attendant investigations was a sufficient reason to deny section 7 protection to a union employee. These decisions beg the question: Are sexual harassment investigations common occurrences such that the NLRA should be interpreted to facilitate them, or are they so rare that the NLRA is irrelevant and employees can be left to the protection of other laws? Instead of allowing the NLRA to be a basis for general worker protection, the *Holling Press* decision narrowed section 7 rights and left aggressive employees who irritate their co-employees with their requests or demands for help, to the possible protection of other laws.

In my earlier article, I stated that the controlling interpretation of "for mutual aid or protection" was broad enough to cover much conduct.<sup>75</sup> Indeed, I argued that in the nonunion setting proving concertedness posed the greatest obstacle to coverage of nonunion workers.<sup>76</sup> *Holling Press* has changed my assessment. As the majority suggests, at least in cases involving grievances or complaints by employees, satisfying the concertedness requirement does not assure section 7 coverage. In a post-*Holling Press* case with similar facts, an administrative law judge concluded that an employee's allegations of sexual harassment were her concern alone and not for mutual aid or protection.<sup>77</sup>

While *Holling Press* dealt mainly with the mutuality requirement, it may also have some influence in cases in which concertedness is the focus.

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75. Corbett, *supra* note 7, at 282-83.

76. *Id.* at 279.

77. Charles Schwab & Co, Inc., Case 28-CA-19445JD(SF)-79-04, 2004 WL 3023761, at \*11 (N.L.R.B. Div. of Judges Dec. 16, 2004).

It seems that employees who assert complaints against their employers may fail to establish coverage under either or both of the section 7 requirements—concertedness or for mutual aid or protection. In *Abramson, LLC*, for example, a contract employee filed, in the midst of a union organizing campaign, a complaint with the EEOC alleging discrimination in violation of Title VII.<sup>78</sup> When the employee sought to return to work after being in the hospital for a short period, the employer proceeded to ask him for the papers he filed with the EEOC. When the employee acknowledged signing the papers, the employer told him that there was no work available. In reviewing the employee's claim that he was terminated for engaging in protected section 7 activity, the Board cited *Holling Press* for the proposition that both prongs of section 7 must be satisfied for conduct to be protected. The majority concluded that the conduct was not concerted because there was no evidence that the employee discussed his concerns underlying his EEOC charge with other employees or sought their assistance. Rather, he was engaged in a "personal campaign."<sup>79</sup> Thus, the employer's asking questions about unprotected conduct was not an unfair labor practice under section 8(a)(1) because it did not interfere with the employee's exercise of his section 7 rights. Although *Holling Press* was decided on the basis of no mutual aid or protection, it was invoked in *Abramson* to buttress a finding of no concertedness.

I noted in my earlier article that Professor Cynthia Estlund and others had criticized the then-controlling interpretation of for mutual aid or protection as too narrow because it required a "traditional self-interested economic objective."<sup>80</sup> Notwithstanding that criticism, I argued that Board precedent established that the scope of for mutual aid or protection was broad enough to cover many types of employee conduct, including expressing or communicating views about employment conditions, challenging rules that restrict employee communications, and speaking out against employers.<sup>81</sup> Now, *Holling Press* makes clear that the meaning of mutual aid or protection has been narrowed and can exclude individual complaints about workplace conditions; ironically, self interest of the employee now seems to be a basis for finding lack of mutual aid or protection.

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78. 345 N.L.R.B. No. 8, 2005 WL 2094928 at \*3 (Aug. 26, 2005).

79. *Id.* at \*4.

80. Corbett, *supra* note 7, at 283 (quoting Cynthia Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 928 (1992) and citing Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 816-19 (1989)).

81. See Corbett, *supra* note 7, at 286-96.

## IV.

LUTHERAN HERITAGE VILLAGE-LIVONIA HOME, INC.: NARROWING  
RESTRICTIONS ON EMPLOYER RULES

One of the ways in which the NLRA provides protection to both union and nonunion employees is by declaring employer rules restricting communications among employees unlawful as unfair labor practices. In my prior article, I discussed the Board's analysis of such rules as established by *Lafayette Park Hotel*.<sup>82</sup> In that decision, the Board held that the mere maintenance of anti-communication rules may be an unfair labor practice in violation of section 8(a)(1) without regard to their application if they are likely to have a chilling effect on section 7 rights. I also discussed several Board and court decisions in which the Board and some courts had found employer prohibitory rules to violate section 8(a)(1).<sup>83</sup> In one case I discussed, *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc.*, the Board used the *Lafayette Park Hotel* analysis and found that an employer's rule prohibiting "abusive or threatening language" was an unfair labor practice.<sup>84</sup> However, the D.C. Circuit denied enforcement of the Board's order, calling it "simply preposterous" to interpret the NLRA as prohibiting employers from maintaining civility in the workplace.<sup>85</sup>

In *Lutheran Heritage Village-Livonia Home, Inc.*,<sup>86</sup> a 3-2 decision, the Board, while not expressly abrogating the analysis of *Lafayette Park Hotel*, evaluated employer rules restricting employee conduct differently than other Board decisions. The Board embraced the D.C. Circuit's analysis in *Adtranz* and suggested that it might have reached a different result in *Lafayette Park Hotel*.<sup>87</sup> The *Lutheran Heritage* decision signals an easing of NLRA restrictions on at least certain types of employer rules regarding employee communications. After *Lutheran Heritage*, rules that restrict aggressive, hostile, or offensive speech are likely to be upheld under the rationale that employees would not understand them as restricting speech protected by section 7.

A. *The Majority: Rules to Ensure a Civil, Decent,  
and Harassment-Free Workplace*

In *Lutheran Heritage*, the Board considered a number of rules maintained by an employer. The Board held that the rules prohibiting

82. 326 N.L.R.B. 824 (1998), *enforced sub nom.* *Lafayette Park Hotel v. NLRB*, 203 F.3d 52 (D.C. Cir. 1999).

83. Corbett, *supra* note 7, at 291-95.

84. 331 N.L.R.B. 291, 293 (2000), *enforcement denied*, 253 F.3d 19 (D.C. Cir. 2001).

85. *Adtranz*, 253 F.3d at 28.

86. 343 N.L.R.B. No. 75, 2004 WL 2678632 (Nov. 19, 2004).

87. *Id.* at \*5 n.9 ("We do not pass on the validity of *Lafayette Park Hotel* . . . insofar as it held unlawful a rule prohibiting 'false, vicious, profane or malicious statements.'").

“abusive and profane language,” “harassment,” and “verbal, mental and physical abuse” were lawful. Finding that the rules by their terms did not explicitly restrict conduct protected by section 7, the Board then turned to whether employees could reasonably construe the rules to prohibit section 7 conduct, whether the employer promulgated the rules in response to union activity, or whether the employer applied the rules in ways to restrict section 7 conduct.<sup>88</sup> Focusing on the first prong, the Board followed the D.C. Circuit’s *Adtranz* analysis and explained that these rules “serve legitimate business purposes: they are designed to maintain order in the workplace and to protect the [employer] from liability by prohibiting conduct that, if permitted, could result in such liability.”<sup>89</sup> The majority explained that reasonable employees would interpret the rules as “ensur[ing] a civil and decent workplace”<sup>90</sup> and not as prohibiting section 7 protected conduct. Specifically, regarding the rule prohibiting harassment, the majority stated that employees have a right to a workplace that is free of unlawful harassing conduct.<sup>91</sup> The majority noted that its holding meant only that the maintenance of such rules was not an unfair labor practice and that applications of those rules to specific conduct might still be found to be an unfair labor practice.

### B. *The Dissent: Civility Not Required by Section 7*

The *Lutheran Heritage* dissent acknowledged that employers have an interest in maintaining a civil workplace and avoiding liability for harassment under federal and state laws.<sup>92</sup> However, the dissent argued that employees could interpret ambiguous rules in a way that placed them in tension with section 7 rights, and that those competing interests must be balanced. For example, the dissent argued that the rule’s use of vague terms without examples could leave employees uncertain whether condemning a supervisor’s treatment of a co-employee might run afoul of the prohibition of “abusive or profane language . . . directed toward a supervisor,” or, whether using a word like “scab,” a disparaging term often used by union supporters, might violate the prohibition of “abusive language.” Responding to the *Adtranz* rationale that such rules are needed by employers to help them avoid liability for sexual and other prohibited harassment, the dissent pointed out that the employer had two rules prohibiting verbal abuse, and a separate rule (in addition to the general harassment rule) covering sexual harassment, rendering the general

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88. *Id.* at \*2-3.

89. *Id.* at \*3.

90. *Id.*

91. *Id.* at \*4.

92. *Lutheran Heritage*, 343 N.L.R.B. No. 75, 2004 WL 2678632 at \*6 (Nov. 19, 2004) (Liebman and Walsh, Members, dissenting).

harassment rule inapplicable to sexual harassment. Accordingly, the dissent found the employer's rules to be overbroad.<sup>93</sup>

The dissent took no consolation in the majority's assertion that application of the rules could be an unfair labor practice. The concern undergirding the *Lafayette Park Hotel* analysis is that the mere maintenance of such rules chills protected activity.<sup>94</sup> The dissent would have rejected the *Adtranz* analysis, which had not previously been accepted by the Board. When workplace terms and conditions are the subject, the dissent noted, tempers sometimes flare, and "[s]ection 7 is not limited to amiable or decorous communications."<sup>95</sup>

### C. Critiquing Lutheran Heritage

By accepting the D.C. Circuit's *Adtranz* analysis, the Board majority clearly diverged from its recent precedents analyzing employer rules prohibiting workplace conduct and communications. In focusing on employer concerns with maintaining a civil and decent workplace and avoiding liability, this decision is similar to *IBM Corp.* Both cases balance the employee's right to engage in section 7 activity with the employer's concerns about other legal restrictions and potential liability by narrowing the scope of NLRA protection and easing the burden on employers. According to the Board, employers can adopt broad restrictive rules without fear of violating the NLRA.

The few Board decisions dealing with rules prohibiting certain workplace conduct since *Lutheran Heritage* have produced mixed results. On the one hand, in three decisions, *Fiesta Hotel Corp.*,<sup>96</sup> *Guardsmark*,<sup>97</sup> and *Stanadyne Automotive Corp.*,<sup>98</sup> the Board applied *Lutheran Heritage* to uphold employer rules restricting employee communication or conduct. In *Fiesta Hotel Corp.* the Board found that a rule that prohibited employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with [other employees]" was valid.<sup>99</sup> As in *Lutheran Heritage*, the dissent cautioned that the decision "threatens to allow employers to take advantage of the chilling effect of ambiguous rules."<sup>100</sup> In *Guardsmark*, the Board applied *Lutheran Heritage* to find lawful an employer rule prohibiting fraternization on- or off-duty and dating or becoming overly friendly with a client's

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93. *Id.* at \*8.

94. *Id.* at \*6-7.

95. *Id.* at \*9.

96. 344 N.L.R.B. No. 159, 2005 WL 19185977, at \*7 (Aug. 15, 2005).

97. 344 N.L.R.B. No. 97, 2005 WL 1378568 (June 7, 2005).

98. 345 N.L.R.B. No. 6, 2005 WL 2342111 (Aug. 24, 2005).

99. *Fiesta Hotel Corp.*, 2005 WL 19185977, at \*1.

100. *Id.* at \*12 (Liebman, Member, dissenting).

employees or co-employees. The dissent found that the inclusion of the anti-fraternization provision rendered the rule susceptible to an interpretation that it prohibited conduct protected by section 7.<sup>101</sup>

In *Stanadyne Automotive*, the president and CEO of the company made a statement in a meeting with employees during a union organizing campaign in which he said that he understood that some union supporters were harassing fellow employees, that employees could be for the company or the union, but that “no one should be harassed [and] [h]arassment of any type is not tolerated by this company and will be dealt with.”<sup>102</sup> The president’s statements were initially found to constitute an unfair labor practice because his language was so broad that employees could reasonably believe that conduct protected by section 7 would come within the term harassment and would not be tolerated. Applying the *Lutheran Heritage* analysis, the Board majority reversed the ALJ. Invoking the threat of employer liability under other laws, the Board said, “In view of the various State and Federal laws that place affirmative obligations upon employers to address workplace harassment, an employer reasonably would react to reports of harassment by informing employees that such conduct will not be tolerated.”<sup>103</sup> The majority then held that the rule was not promulgated in response to union activity and that employees would not reasonably understand the rule against harassment as prohibiting section 7 protected conduct.<sup>104</sup> The dissent disagreed with the majority on both the purpose behind the promulgation of the rule and the reasonable understanding of the employees.<sup>105</sup>

On the other hand, the Board has also applied *Lutheran Heritage* to strike down employer rules. In *Cintas Corp.* the Board invalidated a rule requiring confidentiality of various types of information, such as information concerning the company, its business plans, its partners, new business efforts, customers, accounting, and financial matters.<sup>106</sup> The Board held that the rule’s “unqualified prohibition of the release of ‘any information’ regarding ‘its partners’ could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union.”<sup>107</sup> In *KSL Claremont Resort, Inc.*, the Board found that a rule prohibiting “negative conversations” about associates or managers also unfairly restricted

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101. Guardsmark, 2005 WL 1378568, at \*8 (Liebman, Member, dissenting).

102. *Stanadyne Automotive Corp.*, 2005 WL 2342111, at \*3.

103. *Id.* at \*4.

104. *Stanadyne Automotive Corp.*, 345 N.L.R.B. No. 6, 2005 WL 234211 at \*4 (Aug. 24, 2005).

105. *Id.* at \*13 (Liebman, Member, dissenting in part).

106. 344 N.L.R.B. No. 118, 2005 WL 1564863 (June 30, 2005).

107. *Id.* at \*1.

employee rights.<sup>108</sup> These cases suggest that, notwithstanding the broad deference accorded employers in developing and maintaining workplace rules under *Lutheran Heritage*, rules that can reasonably be understood to prohibit employees' discussions of wages and other terms and conditions of employment will still be unlawful.

While some rules have been struck down, the approach advocated by *Lutheran Heritage* makes broad rules prohibiting certain types of communications and conduct by employees toward other employees more likely to survive an unfair labor practice charge. It is predictable that employers, with the imprimatur of the NLRB, will adopt and maintain such rules and that employees will be disciplined for their violation. While *Holling Press* insulates employers who discipline employees on an ad hoc basis for aggressive or hostile communications, *Lutheran Heritage* insulates employers who adopt prophylactic rules regarding such conduct. Together these Board decisions make it more difficult for employees to associate and to discuss problems of mutual concern if such discussions may at times be heated or uncivil. This is a troubling approach because the Board should know that the history of labor relations demonstrates that employee interactions about terms and conditions of employment often do not resemble polite parlor talk. It is predictable that the decisions and the Board's new elevation of civility over employee communication will have a chilling effect on expression and communication.

## V.

### POTENTIAL RAMIFICATIONS OF THE THREE DECISIONS: NARROWING SECTION 7 RIGHTS

Are these three decisions harbingers of the demise of the NLRA or just three Board decisions in which the Republican and Democratic members of the Board disagreed? While it is too soon to predict the full ramifications and impact of these three Board decisions, it is clear that these decisions, as long as they stand, narrow the scope of section 7 rights for employees represented by a union and render the NLRA less applicable to nonunion employees.

All three decisions involved the relationship between the NLRA and other laws, principally federal and state anti-discrimination laws, and in each case the Board interpreted the NLRA narrowly and left the employee without a remedy. In *IBM Corp.* and *Lutheran Heritage* employers took actions that conceivably might help them avoid liability under discrimination laws. The Board majority restricted the scope of the NLRA in order to enable employers to meet their obligations and assuage their

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108. 344 N.L.R.B. No. 105, 2005 WL 1452400, at \*1 (June 16, 2005).



concerns under these other laws. *Holling Press* presents a different pattern. There an employee made claims under state discrimination laws, and when she was fired for aggressively soliciting a co-employee to assist her with her harassment claim she sought protection under the NLRA. Just as it did in the other cases, the Board narrowly interpreted the NLRA to help employers either avoid possible liability to meet supposed obligations under discrimination laws.

Another feature common to the three decisions is their treatment of civility and decorum in the workplace. Lack of civility and respect for other people has been an important topic of discussion in our society in recent years.<sup>109</sup> One facet of that broader discussion is how these issues impact the workplace.<sup>110</sup> In *Holling Press*, the Board used the aggressive nature of the employee's solicitation for help to classify her conduct as benefiting only herself and not for mutual aid or protection. In *Lutheran Heritage*, the Board discussed the right of employers to establish a "civil and decent work place" and permitted the adoption of a broad prophylactic rule to help accomplish that objective. In *IBM Corp.*, the Board sought to help employers investigate claims of harassment by removing the legal protection for nonunion employees who assist each other during such investigations. The dissent in *Lutheran Heritage* responded to this solicitude for civility by declaring that section 7 protected conduct is not always "amiable and decorous,"<sup>111</sup> and the dissent in *Holling Press* protested that section 7 "requires neither altruism, nor unequivocal solidarity."<sup>112</sup>

The point of this essay is not that the Board is reaching ridiculous results or trying to hurt employees. *IBM Corp.* is a return to a position the Board has taken before, and even though I disagree with the decisions in

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109. The most discussed recent survey regarding Americans' attitudes about incivility is one conducted by Public Agenda and funded by the Pew Charitable Trusts. PUBLIC AGENDA, AGGRAVATING CIRCUMSTANCES: A STATUS REPORT ON RUDENESS IN AMERICA (2002); see also James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1280 (2000) ("It has become common, over the last decade or so, to plead for more 'civility' and 'respect' in American daily life.").

110. See, e.g., *Symposium on Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 235 (2004); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 450 (1997); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000); Marilyn Elias, *Study: Rudeness is Poisoning U.S. Workplace*, USA TODAY, June 14, 2001, at D1; Pat Karlak, *RUDE, RUDE, RUDE: Workplace Incivility Is on the Rise and Companies Are Taking Notice*, CHI. DAILY HERALD, Feb. 27, 2001, Suburban Living, at 1; *Effects of Workplace Incivility Widespread, Likely to Linger, Research Study Concludes*, Daily Lab. Rep. (BNA) No. 117, at A-4 (June 19, 2001).

111. *Lutheran Heritage*, 343 N.L.R.B. No. 75, 2004 WL 2678632 at \*9 (Nov. 19, 2004) (Liebman and Walsh, Members, dissenting).

112. *Holling Press*, 343 N.L.R.B. No. 45, 2004 WL 2368662, at \*8 (Oct. 15, 2004) (Liebman, Member, dissenting).

*Holling Press* and *Lutheran Heritage*, they do not seem beyond the pale of reason to me. However, taking the three decisions together, I see the Board narrowing the section 7 rights of employees and thus narrowing protection under the NLRA. Although this is true for both union and nonunion employees, it is even more so for nonunion employees.

With these three decisions, the vision I had of an NLRA that could provide important rights and protections to nonunion employees is blurring. And with it, the relevance of the Act in the workplaces of the twenty-first century, which are predominantly nonunion,<sup>113</sup> and in the overall employment law regime of the United States is waning. The agency charged with interpreting and enforcing the National Labor Relations Act is narrowing and marginalizing it. Although there can be good reasons for narrow interpretations of laws, I question whether the Board has given good reasons in these cases. In each decision the Board elevates employers' desires to avoid liability under other laws and to ensure civility and decorum in the workplace and subordinates the rights of workers to engage in protected concerted activity for mutual aid or protection—the rights which Congress entrusted to the Board for interpretation and enforcement. As important as the employers' goals are, the objectives of the NLRA also are important, and they should extend to employees engaged in section 7 conduct, regardless of whether they are represented by a union. If the National Labor Relations Board does not proclaim the importance of the National Labor Relations Act and elevate it above other laws with which it *might* conflict who will?

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113. *Supra* note 4.